IN THE

SUPREME COURT OF THE UNITED STATES

NO. 76-1495

RICHARD STROBL,

Petitioner

vs.

STATE OF ARKANSAS,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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INDEX

CASES CITED

IN THE
SUPREME COURT OF THE UNITED STATES

NO. _____

RICHARD STROBL Petitioner

vs

STATE OF ARKANSAS Respondent

Petitioner prays that writ of certiorari issue to review the judgement herein of the Supreme Court of Arkansas entered on the 31st day of January, 1977.

OPINIONS BELOW

The opinion of the Supreme Court of Arkansas affirming the judgement of conviction entered in the trial court is not reported and is printed in Appexdix A hereto.

JURISDICTION

The judgement of the Arkansas Supreme Court was entered January 31, 1977. Jurisdiction of this court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS AND FEDERAL RULES

A. Constitutional provisions:

1. Federal

The fourth Amendment to the United States Constitution:

> "The rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon prob-

able cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The sixth Amendment to the United States Constitution:

"In all criminal prosecutions, the accused shall enjoy the right. . . to have the Assistance of Counsel for his defense."

The fourteenth Amendment to the United States Constitution:

". . . (N) or (r) shall any State deprive any person of life, liberty, or property, without due process of law;. . ."

B. Federal rules:

Rule 19 (1) of the Rules of the Supreme Court of the United States, which provides:

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and improtant reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

   (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

   (b) Where a court of appeals. . . has decided an improtant question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of a judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

QUESTIONS PRESENTED

This criminal matter was tried in a state trial court at Little Rock, Arkansas, to a Judge, without the intervention of a jury. The Judge overruled the motion to suppress filed on behalf of the Petitioner, herein, and, based almost entirely on the evidence sought to be suppressed, thereafter found the Petitioner guilty of the offense of possession of marijuana with intent to deliver.

The Petitioner was a passenger in an automobile operated erratically by John Bray on I-30, in Little Rock, Arkansas. An Arkansas state trooper stopped the automobile which Bray was driving and arrested Bray. The officer then told Petitioner, Richard Strobl, to get out of the car and he alighted from the right front passenger seat. Upon doing so, the officer arrested him. This, even though, by the officer's own testimony, Petitioner had committed no offense. The officer caused the automobile to be impounded and thereafter searched, pursuant to a search warrant which he obtained the next morning. The search warrant, as to Petitioner, was based upon and issued entirely as a result of observations made by the officer following the arrest of Petitioner. The search disclosed 150 lbs of marijuana in the trunk of the automobile, which was seized.

Upon Petitioner being adjudged guilty, trial counsel submitted a pre-sentence report to the court setting out many favorable details about and accomplishments of Petitioner, during his life to date. The trial Judge refused to look at the presentence report, even though Petitioner was a first offender stating.

"I don't pay any attention to these reports. In fact, I have never read one of them. As I say, I have been down here (on the trial bench) for twenty-one years and we don't

make any pre-sentencing reports here." (T.R. 99, Appendix B)

The trial Judge them imposed a sentence of 5 years imprisonment. The Arkansas Supreme Court affirmed. The questions presented are:

1. Where a trial Judge, with a stated history of 21 years on the trial bench wherein he has caused or permitted a pre-sentence investigation to be made for use by him in meting out punishment is a criminal case to an adjudged guilty defendant, refuses to consider or even view what counsel for such a defendant, submits to him by way of a pre-sentence report, does such refusal effectively deny said criminal defendant, right to counsel guaranteed under the 6th Amendment.

2. Where a state trial Judge refuses to read and consider a pre-sentencing report prepared by defendant's counsel concerning an adjudged guilty criminal defendant-first offender when no other pre-sentence investigation is done under the court's or anyone elses direction, does such refusal deny defendant due process of law guaranteed him under the 14th Amendment?; and, does such refusal so far depart from the accepted and usual course of judicial proceedings, such being sanctioned by affirmance by the Arkansas Supreme Court, as to call for an exercise of the United States Supreme Court's power of supervision?

3. Where facts and circumstances making up the basis for the issuance of a search warrant authorizing search of an automobile in which a criminal defendant is riding as passenger are made known to and gathered by the affiant to such search warrant, following and as the result of an illegal arrest of such defendant, should such search warrant and resultant search and seizure be permitted to stand thereby permitting to evidence thereunder seized to be used against the defendant in a subsequent criminal prosecution?

4. Where a passenger in an automobile, which is stopped by an Arkansas state trooper for being driven erratically, commits no offense of which the officer is aware but is arrested because the officer is suspicious of the driver, is such arrest

illegal as to the passenger so as to taint any evidence searched for and seized by said officer as a result of such arrest?

STATEMENT

Shortly after noon on December 14, 1975, Arkansas State Police Patrolman, David Hendershott, stopped a Chevrolet automobile being driven eastbound on I-30 at Geyer Srpings in Little Rock, Arkansas.

The officer told the driver, John Bray, to get out and produce his driver's license and registration. Mr Bray got out and the officers followed Bray to the rear of the Chevrolet.

Hendershott told Bray that he was observed driving erratically and was suspected of being drunk. The officer advised Mr. Bray of his rights and then asked the passenger in the Chevrolet, Richard Strobl, Petitioner herein, to get out. The officer advised Mr. Strobl of his rights and then called for a back-up unit. At this point, both men were under arrest, the officer testified.

While both Bray and Strobl were in custody of three officers, who arrived shortly after the arrest, Hendershott went to the passenger side front seat. He leaned inside and observed a small quantity of green vegetable material lying on the right front floor mat. Hendershott said he picked up two or three particles of the green vegetation.

The Chevrolet was impounded and the next day Hendershott obtained a search warrant and searched the trunk of the car where he found 150 plus pounds of marijuana.

A motion to suppress was filed and, after hearing thereon, was overruled. (T.R. 87, Appendix C). The marijuana was permitted to go into evidence in the case against Petitioner. The judge found both defendants guilty. Counsel for Petitioner prepared and delivered to the court a documented, pre-sentence investigation report covering much of the personal history of Petitioner, including his accomplishments, his background, his clean record, his family and other data bearing upon the question of his worthiness of consideration for

leniency. The Judge refused to consider or even view the report notwithstanding the fact that no other presentence investigation had been or was to be made concerning Petitioner. The maximum penalty, in years, under the applicable Arkansas statute for this offence is 10 years. The judge, at first, imposed the maximum penalty, 10 years, but then modified that order, after much pleading with him by counsel for Petitioner, to a 5 year term of imprisonment.

Under Arkansas practice, appeals from District Courts, the trial court designation, in Pulaksi County, the county in which the state capital, Little Rock, is located, are taken directly to the Arkansas Supreme Court. In the assignments of error, to that court, which under their practice are described as"points to be relied upon", the same federal questions were raised (Appellant's brief, pp. 5 & 6, Appendix D) as in the motion to suppress at the trial court. The only exception being the federal question arising from the trial judge's refusal to consider the presentence report. This question was raised formally at the first opportunity to do so, in the Arkansas Supreme Court.

REASONS FOR GRANTING THE WRIT

The decision of the Arkansas Supreme Court should be reviewed because it decided important questions of state and federal law:

(a) in a manner sanctioning a far departure from the accepted and usual course of judicial proceedings, and

(b) in a manner not in accord with applicable state and federal decisions.

The arrest of Petitioner, by this officer without a warrant, was not based upon probable cause to make him believe Petitioner had committed an offense. By the arresting officer's own testimony, the Petitioner had committed no offense of which the officer had any information at the time of his arrest. The Petitioner was merely a lawful passenger in an automobile being driven in an erratic manner by another person. Arrest, with or without a warrant, must stand upon firmer

ground than mere suspicion. Wong Sun v. U.S., 83 S.Ct. 407, 371 U.S. 471, 9L. Ed. 2d 441.

The officer, after arresting Petitioner, entered the automobile at the place from which he had instructed Petitioner to remove himself. There he allegedly found particles of marijuana. This discovery was, in turn, a part of the basis for the issuance of the search warrant. The execution of the search warrant resulted in the seizure of marijuana from the trunk of the automobile used in evidence to convict Petitioner.

II

Following the court's guilty finding, Petitioner, by his counsel furnished the court with a presentence investigation report relating to him and requested the court to consider it before meting out any sentence. The court refused to consider or even read such materials.

The trial court had the discretion to impose any sentence, upon conviction, it chose, within the limits of the statute, and, further, to suspend the execution of that sentence, if it saw fit. And, discretion of trial courts in sentencing, will not be disturbed by appellate courts, at least as to revocation of suspended sentences, except for gross abuse of discretion. Fant v. State, 498 S. W. 2d 332 (Ark).

By refusing the Petitioner's request and in view of the fact that no other pre-sentence investigation had been made, the court abused it's discretion. McCleary v. State, 182 N.W. 2d 512 (Wis.) And, it effectively denied Petitioner's right to counsel and to due process of law.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari be granted.

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APPENDIX A
DIVISION I

SUPREME COURT OF ARKANSAS

No. CR 76-183

Opinion Delivered–January 31, 1977

RICHARD STROBL and
JOHN BRAY

Appellants,

v.

STATE OF ARKANSAS,

Appellee

Appeal from Pulaski Circuit Court, First Division; William J. Kirby, Judge.

Affirmed.

GEORGE ROSE SMITH, J. The appellants, tried without a jury were convicted of possession of marijuana with intent to deliver and were each sentenced to five years imprisonment. Their fundamental argument for reversal is that their arrest was without probable cause, so that the 153 pounds of marijuana found in the trunk of their car should not have been admitted into evidence.

That contention is without merit. Officer Hendershott, in response to a radio report and also on the basis of his own observation, stopped the appellants' car on Interstate 30, because it was weaving erratically from one lane to the other. The rear end of the car appeared to be overloaded. When the driver of the car alighted, he seemed to be intoxicated; but as there was no odor of alcohol the officer suspected that narcotics were involved. After the two men had been warned of their rights and questioned, Hendershott and another officer looked into the car and saw a small amount of green vegetable matter, in plain view on the floor, which they recognized as marijuana. While the officers were discussing whether to search the car, they discovered a plastic package, containing a white powder (which proved to be cocaine), on the pavement

where the men had been questioned. At that point the two men were arrested and taken to headquarters. Upon the facts stated there cannot be the slightest doubt about the existence of probable cause for the arrest. Perez v. State, 260 Ark. 438, 541, S.W. 2d 915 (1976); Hileman v. State, 259 Ark. 567, 535 S.W. 2d 56 (1976). In fact, the officers would have been at fault had they permitted the men to continue to drive in a dangerous manner on an interstate highway.

A later search of the car, pursuant to a search warrant, disclosed 63 packages of marijuana in the trunk. It is argued that the affidavit for the search warrant was deficient, but the point is not properly presented, as the warrant is not abstraced. O'Neal v. Warmack, 250 Ark. 685, 466 S.W. 2d 913 (1971); Peek v. Helena Chemical Co., 247 Ark. 801, 448 S.W. 2d 32 (1969). Nor can we say that the trial judge's refusal to consider proffered presentencing memoranda was prejudicial as the contents of the memoranda have not been abstracted.

Affirmed.

We agree. Harris. C.J., and Fogelman and Byrd, JJ.

APPENDIX B

Page 100, Bill of Exceptions:

"THE COURT:

I don't pay any attention to these reports. In fact, I have never read one of them. As I say, I have been down here for twenty-one years and we don't make any pre-sentencing reports here. I try to be as light on a first offender as I can.

. . ."

APPENDIX C

Page 87, Bill of Exceptions:

"THE COURT:

It's cutting it might fine, but I guess that's sufficient. I'm going to hold that anyhow and take a chance. I'm not what you would call—I haven't got any pride in my affirmances in the Supreme Court, I might say. I used to never want to make a mistake, but I've been down here twenty-one years and I have made several and it doesn't bother me anymore. I will go with the state at this time and overrule your motion.

. . ."

APPENDIX D

5

POINTS TO BE RELIED UPON

I

The trial court erred in overruling the motion of defendants to suppress the evidence and in permitting the evidence seized to be admitted into evidence in the case in that the arrest of defendants was illegal and the search and seizure made incident to such illegal arrest was unreasonable.

II

The trial court erred in overruling the motion of defendants to suppress the evidence and in allowing the evidence seized under the search warrant to be introduced into evidence in the case in that:

a. The affidavit supporting the search warrant recites information which the affiant learned as a result of an illegal and unreasonable search and seizure.

b. The affidavit supporting the search warrant did not establish probable cause to issue the search warrant.

III

The trial court erred in refusing to consider or read the pre-sentence memoranda submitted to the court for each defendant after its guilty finding and before sentence was pronounced.